

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DIDI T. LARA,) No. CV 15-5431 AS
)
) Plaintiff,)
) v.)
)
CAROLYN W. COLVIN,) MEMORANDUM OPINION AND
Commissioner of Social)
Security,) ORDER OF REMAND
)
) Defendant.)
)
)

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

On July 17, 2015, Plaintiff filed a Complaint pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3) seeking review of the denial of her application for disability insurance benefits and supplemental security income (Docket Entry No. 1). On November 20, 2015,

1 Defendant filed an Answer to the Complaint and the Certified
2 Administrative Record ("AR"), (Docket Entry Nos. 14-15). The parties
3 have consented to proceed before a United States Magistrate Judge.
4 (Docket Entry Nos. 11-12). On February 5, 2016, the parties filed a
5 Joint Stipulation ("Joint Stip.") setting forth their respective
6 positions regarding Plaintiff's claims. (Docket Entry No. 16).

7
8 The Court has taken this matter under submission without oral
9 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures In Social
10 Security Case," filed July 17, 2015 (Docket Entry No. 9).

11
12 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
13

14 On April 17, 2012, Plaintiff Didi T. Lara ("Plaintiff") applied
15 for disability insurance benefits and supplemental security income,
16 alleging a disabling condition beginning March 31, 2009. (AR 172,
17 176). On December 16, 2013, the Administrative Law Judge, Michael D.
18 Radensky ("ALJ"), examined Plaintiff's medical records and heard
19 testimony from Plaintiff and vocational expert ("V.E.") Sandra
20 Fioretti (AR 23-64).

21
22 Plaintiff testified as follows: She last worked in March 2009 as
23 a "health-care giver" but stopped because she was "going through a
24 lot of pain." (AR 27). Although she had experienced shooting pain
25 in her fingers and arms since 1997, she became unable to work when
26 the pain became a constant "everyday thing." (AR 34-35). She never
27 had a pain-free day, but her pain level fluctuated between seven or
28 eight and twelve on a ten-point scale. (AR 35-36). She could lift

1 five pounds, stand for about two hours without stopping, and sit for
2 about an hour without stopping. (AR 45-47). She "sometimes" tried
3 to lift a dish or "get a gallon of milk or something that we need at
4 Wal-Mart," but her pain made these tasks difficult. (AR 46, 48).
5 She spent three or four hours lying down between 9:00 AM and 5:00 PM
6 every day. (AR 49). In response to questioning by the ALJ,
7 Plaintiff stated that she drives to appointments and to pick up and
8 drop off her daughter every day (AR 50), she sometimes uses public
9 transportation (id.), she does "most of the [cooking]" in her
10 household, often something "easy" like pasta, she and her daughter do
11 laundry together (AR 50-51), and she also grooms and cleans up after
12 a toy poodle, goes to the library, and sometimes runs other errands.
13 (AR 52-54).

14

15 The V.E. testified that jobs existed for an individual limited
16 to light work with the following additional limitations: occasional
17 postural activities; no climbing ladders, ropes, or scaffolds;
18 limited on the dominant right upper extremity to frequent but not
19 constant fine and gross manipulation; limited on the left upper
20 extremity to occasional fine and gross manipulation; avoid
21 concentrated exposure to extreme cold, vibration, fumes, odors,
22 dusts, gases, and poor ventilation; and no unprotected heights or
23 dangerous machinery. (AR 60-61). The V.E. noted, though, that there
24 were no jobs for such an individual who would also be off task for
25 twenty percent of the workday or who would require a ten or fifteen
26 minute break every hour. (AR 61-62).

27

28 On January 9, 2014, the ALJ issued a decision denying

1 Plaintiff's application. (See AR 11-18). The ALJ applied the five-
 2 step process in evaluating Plaintiff's case. (AR 12-13). At step
 3 one, the ALJ determined that Plaintiff had not engaged in substantial
 4 gainful activity after the alleged onset date. (AR 13). At step
 5 two, the ALJ found that Plaintiff had severe impairments including
 6 reflex sympathetic dystrophy left upper extremity, obesity, and
 7 degenerative disc disease of the cervical spine. (AR 13). At step
 8 three, the ALJ concluded that Plaintiff's impairments did not meet or
 9 equal a listing found in 20 C.F.R. Part 404, Subpart P, Appendix 1.
 10 (AR 14).

11

12 Before proceeding to step four, the ALJ determined that
 13 Plaintiff had the residual functional capacity ("RFC")¹ to perform
 14 light work² with the following limitations: "occasional postural
 15 activities (i.e. climbing ramps or stairs, balancing, stooping,
 16 kneeling, crouching, and crawling), except she cannot climb ladders,
 17 ropes, or scaffolds; her dominant right upper extremity is limited to
 18 frequent but not constant fine and gross manipulation; her left upper
 19 extremity is limited to occasional fine and/or gross manipulation;
 20 she is to avoid concentrated exposure to extreme cold, vibration,
 21 fumes, odors, dusts, and gases; she cannot be in an environment with
 22 poor ventilation; she cannot work on unprotected heights or on
 23 dangerous machinery." (AR 14). In making this finding, the ALJ

24

¹ Residual Functional Capacity is what a claimant can still do
 25 despite existing exertional and nonexertional limitations. See 20
 26 C.F.R. § 404.1545(a)(1).

27

² Light work "involves lifting no more than 20 pounds at a
 28 time with frequent lifting or carrying of objects weighing up to 10
 pounds." See 20 C.F.R. §§ 404.1567(b).

1 found that Plaintiff's testimony regarding her activities of daily
2 living "diminish[ed] the credibility of [Plaintiff]'s allegations of
3 functional limitations" and that Plaintiff's testimony regarding the
4 intensity, persistence, and limiting effects of her symptoms was not
5 entirely credible. (AR 15, 17). At step four, the ALJ determined
6 that Plaintiff could return to her past work as a retail store
7 manager (AR 17), and therefore found that Plaintiff was not disabled
8 within the meaning of the Social Security Act. (AR 18).

9
10 The Appeals Council denied Plaintiff's request for review of the
11 ALJ's decision. (AR 1-4). The ALJ's decision then became the final
12 decision of the Commissioner, allowing this Court to review the
13 decision. See 42 U.S.C. §§ 405(g), 1383(c).

14
15 **STANDARD OF REVIEW**

16
17 This court reviews the Administration's decision to determine if
18 the decision is free of legal error and supported by substantial
19 evidence. See Brewes v. Commissioner of Social Sec. Admin., 682 F.3d
20 1157, 1161 (9th Cir. 2012). "Substantial evidence" is more than a
21 mere scintilla, but less than a preponderance. Garrison v. Colvin,
22 759 F.3d 995, 1009 (9th Cir. 2014). To determine whether substantial
23 evidence supports a finding, "a court must consider the record as a
24 whole, weighing both evidence that supports and evidence that
25 detracts from the [Commissioner's] conclusion." Aukland v.
26 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (internal quotation
27 omitted). As a result, "[i]f the evidence can reasonably support
28 either affirming or reversing the ALJ's conclusion, [a court] may not

1 substitute [its] judgment for that of the ALJ." Robbins v. Soc. Sec.
2 Admin., 466 F.3d 880, 882 (9th Cir. 2006).

3

4 **PLAINTIFF'S CONTENTIONS**

5

6 Plaintiff contends that the ALJ erred in failing to properly
7 consider her testimony and make proper credibility findings. (Joint
8 Stip. at 2, 5-6).

9

10 **DISCUSSION**

11

12 After consideration of the record as a whole, the Court finds
13 that Plaintiff's claim warrants a remand for further consideration.

14

15 **A. The ALJ Failed to Properly Assess Plaintiff's Credibility**

16

17 A claimant initially must produce objective medical evidence
18 establishing a medical impairment reasonably likely to be the cause
19 of the subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281
20 (9th Cir. 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
21 1991). Once a claimant produces objective medical evidence of an
22 underlying impairment that could reasonably be expected to produce
23 the pain or other symptoms alleged, and there is no evidence of
24 malingering, the ALJ may reject the claimant's testimony regarding
25 the severity of his pain and symptoms only by articulating specific,
26 clear and convincing reasons for doing so. Brown-Hunter v. Colvin,
27 798 F.3d 749, 755 (9th Cir. 2015) (citing Lingenfelter v. Astrue, 504
28 F.3d 1028, 1036 (9th Cir. 2007)); see also Smolen, 80 F.3d at 1281;

1 Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998); Light v. Social
2 Sec. Admin., 119 F.3d 789, 792 (9th Cir. 1997). Because the ALJ does
3 not cite to any evidence in the record of malingering, the "clear and
4 convincing" standard applies.

5

6 As set forth below, the ALJ failed to provide clear and
7 convincing reasons for finding that Plaintiff's testimony about the
8 intensity, persistence and limiting effects of her symptoms was not
9 fully credible.

10

11 The ALJ analyzed Plaintiff's testimony as follows:

12

13 [Plaintiff] testified she could [perform] a variety of
14 activities of daily living (sometimes with the help of her
15 daughter), such as drive, sometimes use public
16 transportation, cook, do laundry, clean up after a small
17 dog, and do errands. [Plaintiff] self-assesses that she
18 could sit for 40 minutes to an . . . hour at a time. She
19 could stand for more than 2 hours at a time.

20

21 [Plaintiff] has described daily activities that are not
22 limited to the extent one would expect, given the
23 complaints of disabling symptoms and limitations. Some of
24 the physical and mental abilities and social interactions
25 required in order to perform these activities are the same
26 as those necessary for obtaining and maintaining
27 employment. The [ALJ] finds [Plaintiff]'s ability to

1 participate in such activities diminishes the credibility
2 of [Plaintiff]'s allegations of functional limitations.

3
4 After careful consideration of the evidence, the [ALJ]
5 finds that [Plaintiff]'s medically determinable impairments
6 could reasonably be expected to cause some of the alleged
7 symptoms; however, [Plaintiff]'s statements concerning the
8 intensity, persistence and limiting effects of these
9 symptoms are not entirely credible for the reasons
10 explained in this decision.

11
12 (AR 15-16).

13
14 The ALJ failed to "specifically identify 'what testimony is not
15 credible and what evidence undermines [Plaintiff's] complaints.'" Parra v. Astrue, 481 F.3d 742, 750 (9th Cir. 2007) (quoting Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995)); see also Smolen v. Chater, supra, 80 F.3d at 1284 ("The ALJ must state specifically what symptom testimony is not credible and what facts in the record lead to that conclusion").

21
22 The ALJ's discounting of Plaintiff's testimony based on
23 Plaintiff's abilities to perform certain daily activities, such as
24 "drive, sometimes use public transportation, cook, do laundry, clean
25 up after a small dog, and do errands," was not a clear and
26 convincing reason. See Vertigan v. Halter, 260 F.3d 1044, 1050 (9th
27 Cir. 2001) ("[T]he mere fact that a plaintiff has carried on certain
28 daily activities . . . does not in any way detract from her

1 credibility as to her overall disability. One does not need to be
2 'utterly incapacitated' in order to be disabled."); Reddick v.
3 Chater, supra ("Only if the level of activity were inconsistent with
4 the Claimant's claimed limitations would these activities have any
5 bearing on Claimant's credibility."). The ALJ also overstates the
6 degree to which the activities described in Plaintiff's testimony are
7 consistent with activities necessary to secure and maintain
8 employment. It is not clear from the record, and the ALJ did not
9 attempt to ascertain, the specifics, and/or extent, of Plaintiff's
10 abilities to do such daily activities. Therefore, the degree to
11 which Plaintiff could perform such daily activities may not have been
12 inconsistent with her claims of frequent disabling pain that prevents
13 her from working. See Reddick v. Chater, supra; see also Morgan v.
14 Commissioner of Social Sec. Admin., 169 F.3d 595, 600 (9th Cir.
15 1999) ("If a claimant is able to spend a substantial part of his day
16 engaged in pursuits involving the performance of physical functions
17 that are transferable to a work setting, a specific finding as to
18 this fact may be sufficient to discredit a claimant's allegations.").
19 Here, the ALJ failed to meaningfully address Plaintiff's claim that
20 she spends three or four hours lying down every day (AR 49-50), or
21 Plaintiff's testimony that she "give[s] up many times" when
22 attempting to run errands or perform other activities and her pain
23 sometimes waxes and wanes while she attempts to undertake errands.
24 (AR 48).

25
26 The Ninth Circuit "has repeatedly asserted that the mere fact
27 that a plaintiff has carried on certain daily activities, such as
28 grocery shopping, driving a car, or limited walking for exercise,

1 does not in any way detract from her credibility as to her overall
 2 disability. See Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir.
 3 2001) (finding "only a scintilla" of evidence supporting ALJ's
 4 adverse credibility finding where claimant was able to go grocery
 5 shopping with assistance, walk approximately an hour in the mall, get
 6 together with friends, play cards, swim, watch television, read,
 7 undergo physical therapy, and exercise at home); see also Reddick,
 8 supra, 157 F.3d at 722 (activities of daily living affect a
 9 claimant's credibility "[o]nly if the level of activity [is]
 10 inconsistent with the [c]laimant's claimed limitations"; ALJ erred by
 11 "not fully accounting for the context of materials or all parts of
 12 the testimony and reports," resulting in paraphrasing of record
 13 material that was "not entirely accurate regarding the content or
 14 tone of the record").

15

16 Defendant argues that the ALJ's adverse credibility
 17 determination was also proper based upon: (1) the lack of objective
 18 medical evidence supporting Plaintiff's claimed limitations; (2) the
 19 existence of medical evidence affirmatively contradicting Plaintiff's
 20 claimed limitations; and (3) Plaintiff's relatively conservative
 21 treatment regimen. (Joint Stip. at 13). However, the Court cannot
 22 affirm the ALJ's decision on grounds which the ALJ did not rely. As
 23 the Ninth Circuit recently stated in Burrell v. Colvin, 775 F.3d 1133
 24 (9th Cir. 2014):

25

26 The government argues that Claimant's testimony that she
 27 has, on average, one or two headaches a week conflicts with
 28 the medical record. As an initial matter, the ALJ never

1 connected the medical record to Claimant's testimony about
2 her headaches. Although the ALJ made findings [. . .]
3 concerning Claimant's treatment for headaches, he never
4 stated that he rested his adverse credibility determination
5 on those findings. For that reason alone, we reject the
6 government's argument that the history of treatment for
7 headaches is a specific, clear, and convincing reason to
8 support the credibility finding.

9

10 See id. at 1138-39; see also *Connett v. Barnhart*, 340 F.3d 871, 874
11 (9th Cir. 2003) ("It was error for the district court to affirm the
12 ALJ's credibility decision based on evidence that the ALJ did not
13 discuss. Because the ALJ did not assert specific facts or reasons to
14 reject Connett's testimony . . . we must reverse the district court
15 on this issue").

16

17 Here, the ALJ summarized the medical evidence, noting that
18 Plaintiff generally received conservative treatment and that some
19 doctors, particularly state agency physicians and a consultative
20 examiner, reported that Plaintiff was able to perform light work.
21 (AR 16-17). The ALJ then concluded:

22

23 In sum, the above residual functional capacity assessment
24 is supported by the evidence as a whole. [Plaintiff]'s
25 subjective complaints are less than fully credible and the
26 objective medical evidence does not support the alleged
27 severity of the symptoms. [Plaintiff]'s limitations would
28 not preclude the performance of substantial gainful

1 activity. The [ALJ] notes [Plaintiff] takes copious heavy
 2 pain medications, which may be exacerbating her condition,
 3 but her main condition appears to be focused on the left
 4 upper extremity. But there is little evidence of any other
 5 significant problems. For all the foregoing reasons, [t]he
 6 [ALJ] finds [Plaintiff] was not under a disability. . . ."

7
 8 (AR 17).
 9

10 Although the ALJ found that Plaintiff's daily activities
 11 diminished her credibility, the ALJ did not tie his summary of the
 12 medical evidence to an analysis of Plaintiff's credibility, which,
 13 aside from a vague reference to "the reasons explained in this
 14 decision," appears to have taken place immediately following the
 15 ALJ's discussion of Plaintiff's daily activities. See Burrell, 775
 16 F.3d at 1138-39 ("Although the ALJ made findings . . . concerning
 17 [c]laimant's treatment for headaches, he never stated that he rested
 18 his adverse credibility determination on those findings); (see also
 19 AR 16 (stating, immediately after analyzing daily activities, that
 20 "[a]fter careful consideration of the evidence, the [ALJ] finds that
 21 [Plaintiff]'s medically determinable impairments could reasonably be
 22 expected to cause some of the alleged symptoms; however,
 23 [Plaintiff]'s statements concerning the intensity, persistence and
 24 limiting effects of these symptoms are not entirely credible for the
 25 reasons explained in this decision.")). Therefore, the ALJ's
 26 decision does not provide the specificity required by case law.

27 //
 28 //

1 Moreover, the Ninth Circuit has expressed doubt as to whether a
 2 treatment regimen including "powerful pain medications and
 3 injections" constitutes "conservative treatment." See Lapeirre-Gutt
 4 v. Astrue, 382 F. App'x 662, 664 (9th Cir. 2010); (see also AR 16
 5 (Plaintiff was repeatedly prescribed Vicodin), 386, 392, 402
 6 (Plaintiff was recommended for and received nerve block injections
 7 for her conditions)). Finally, in the absence of other appropriate
 8 reasons to find Plaintiff's testimony not fully credible, the fact
 9 that Plaintiff's pain was not substantiated by objective medical
 10 evidence does not provide an appropriate basis upon which to affirm.
 11 Light, 119 F.3d at 792-793 ("[A] finding that the claimant lacks
 12 credibility cannot be premised wholly on a lack of medical support
 13 for the severity of his pain.").

14

15 **B. The ALJ's Error Was Not Harmless**

16

17 "[H]armless error principles apply in the Social Security . . .
 18 context." Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012)
 19 (citing Stout v. Comm'r Soc. Sec. Admin., 454 F.3d 1050, 1054 (9th
 20 Cir. 2006)). Generally, "an ALJ's error is harmless where it is
 21 'inconsequential to the ultimate nondisability determination.'" Id.
 22 (citing Carmickle v. Comm'r Soc. Sec. Admin., 466 F.3d 880, 885 (9th
 23 Cir. 2006)).

24

25 The Court cannot conclude that the ALJ's errors were harmless.
 26 The limiting effects of Plaintiff's impairments were directly
 27 relevant to assessing her RFC. A claimant's RFC "may be the most
 28 critical finding contributing to the final . . . decision about

1 disability." See McCawley v. Astrue, 423 F. App'x 687, 689 (9th Cir.
 2 2011) (quoting SSR 96-5p). Here, Plaintiff's RFC was central to the
 3 ALJ's determination that Plaintiff could perform her past relevant
 4 work as a retail store manager despite her limitations. (AR 17-18).
 5 "This work does not require the performance of work-related
 6 activities precluded by [Plaintiff's] residual functional capacity."
 7 (AR 17). Because the Court cannot determine that the ALJ's errors
 8 are "inconsequential to the ultimate disability determination," the
 9 errors cannot be deemed harmless. See Carmickle, 466 F.3d at 885.

10

11 **A. Remand Is Warranted**

12

13 The decision whether to remand for further proceedings or order
 14 an immediate award of benefits is within the district court's
 15 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000).
 16 Where no useful purpose would be served by further administrative
 17 proceedings, or where the record has been fully developed, it is
 18 appropriate to exercise this discretion to direct an immediate award
 19 of benefits. Id. at 1179 ("[T]he decision of whether to remand for
 20 further proceedings turns upon the likely utility of such
 21 proceedings."). However, where the circumstances of the case suggest
 22 that further administrative review could remedy the Commissioner's
 23 errors, remand is appropriate. McLeod v. Astrue, 640 F.3d 881, 888
 24 (9th Cir. 2011); Harman, 211 F.3d at 1179-81.

25

26 Since the ALJ failed to properly assess Plaintiff's credibility,
 27 remand is appropriate. Because outstanding issues must be resolved
 28 before a determination of disability can be made, and "when the

1 record as a whole creates serious doubt as to whether the [Plaintiff]
2 is, in fact, disabled within the meaning of the Social Security Act,"
3 further administrative proceedings would serve a useful purpose and
4 remedy defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir.
5 2014)(citations omitted).

6

7 The Court has not reached any other issue not discussed supra
8 except to determine that reversal with a directive for the immediate
9 payment of benefits would be inappropriate at this time. In addition
10 to the issues addressed in this order, the ALJ should consider on
11 remand any other issues raised by Plaintiff, if necessary.

12

13 **ORDER**

14

15 For the foregoing reasons, the decision of the Commissioner is
16 reversed, and the matter is REMANDED for further proceedings pursuant
17 to Sentence 4 of 42 U.S.C. § 405(g).

18

19 LET JUDGMENT BE ENTERED ACCORDINGLY.

20

21 Dated: April 20, 2016

22 /s/

23 ALKA SAGAR

24 UNITED STATES MAGISTRATE JUDGE